

No. 8116

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LAU HU YUEN, alias Lau Chock Wah, <i>Appellant,</i>
VS.
UNITED STATES OF AMERICA, <i>Appellee.</i>

Upon Appeal from the District Court of the United States
for the Territory of Hawaii.

BRIEF ON BEHALF OF APPELLEE.

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for the Territory of Hawaii.

BRIEF ON BEHALF OF APPELLEE.

STATEMENT OF THE CASE.

This action arose upon a complaint for deportation under the Chinese Exclusion Act, Section 13, Act of September 13, 1888, 25 Stat. 479, 8 U.S.C.A. 282, filed on December 10, 1934, alleging that Lau Hu Yuen "on or about the 30th day of April, 1923, did unlawfully obtain admission into the United States at the Port of Honolulu by false and fraudulent representations and claim of citizenship made before the immigration officials at the Port of Honolulu", and "is not lawfully entitled to be or remain in the United States." (R. pp. 4, 5.)

This appeal is from an order of deportation entered on April 9, 1935, by the United States District Court for the Territory of Hawaii.

Lau Hu Yuen has been continuously resident in the Territory of Hawaii since his admission by a Board of Special Inquiry at Honolulu, T. H., on April 30, 1923. The facts presented in this case came to light as a result of the Appellant's application on October 20, 1934, to Immigration Officials for a "certificate of citizenship—Hawaiian Islands". (U. S. Exhibit No. 3, R. 38, 39.)

Since the Appellant was issued a Chinese certificate of identity (U. S. Exhibit No. 2, R. 36-38) on May 29, 1923, as a result of his admission as a citizen, the issues raised by the assignments of error are:

First, did the Government's evidence overcome the prima facie effect of this certificate of identity and of the action of the Board in admitting Appellant as a citizen, and thereby warrant the trial Court's action in holding the Appellant to the statutory requirement of establishing by affirmative proof to the satisfaction of the Court Appellant's lawful right to remain in the United States as required by Section 3, Act of May 5, 1892, 27 Stat. 25, 8 U.S.C.A. 284?

Second, did the Appellant sustain this statutory burden?

The initial question, then, is whether the record presents any "substantial evidence tending to impeach" the *correctness* of the certificate of identity, or "to show that the holder's status is other than what is certified": *Lum Man Shing v. U. S.*, 29 F. (2d) 500, 501 (C.C.A. 9, 1928). Or, as this Court later phrased the rule in 1929, whether the decision of the Board of Special Inquiry is in any wise "impeached for either

fraud or error": *Leong Kwai Yin v. U. S.*, 31 F. (2d) 738, 739.

SUMMARY OF ARGUMENT.

I.

In the proceedings before the Board of Special Inquiry in 1923 Appellant claimed, among other things, that his mother was Tom Shee who died in Honolulu June 19, 1899, and that her remains were taken to China in 1917 and that he left Hawaii when two years old accompanied by his father. (R. pp. 19-33.)

II.

Appellant's claim of his mother's death in Honolulu was supported by a death record in the Board of Health. Without the element of corroboration afforded by the Board of Health death record of Tom Shee, Appellant's evidence of alleged Hawaiian birth before the Board of Special Inquiry in 1923 was inadequate. (R. pp. 33, 88, 19-33.)

Hung You Hong v. U. S., 68 F. (2d) 67.

III.

The Board of Health death record of the Tom Shee claimed by the Appellant as his mother was relied on by the Board of Special Inquiry in 1923 as referring to Appellant's mother. (R. pp. 33, 19-33.)

IV.

Since being admitted in 1923 Appellant has reaffirmed his claim that the Tom Shee mentioned in

the Board of Health record is his mother. (R. pp. 102, 127-138.)

V.

The Government proved that the Tom Shee mentioned in the Board of Health death record was not Appellant's mother and that no other person answering Appellant's description of his mother died in Honolulu at or within a reasonable time of the date of Appellant's mother's alleged death in Honolulu, thus proving that Appellant obtained his admission into the United States in 1923 by fraudulent representations of citizenship. The effect of this was to overcome the prima facie case for Appellant's citizenship created by the prior favorable action of the Administrative Board. (R. pp. 90-91.)

Young Mew Song v. U. S., 36 F. (2d) 563;
Ex Parte Wong Yee Toon, 227 F. 247, 252;
W. P. Walker & Co. v. Walbridge, 136 F. 19,
 23;
Lynch v. Mercantile Trust Co., 18 F. 486;
 26 *Corpus Juris* 1109, Sec. 39.

VI.

Fraud is not the sole ground for impeachment of the prior favorable action of the Administrative Board. The prima facie case for Appellant may be overcome by a showing of error, mistake or improvidence on the part of the admitting board.

Lui Hop Fong v. U. S., 209 U.S. 453;
Lui Hip Chin v. Plummer, 238 F. 762;
Lum Man Sing v. U. S., 29 F. (2d) 500, 501,
 502;

Leong Kwai Yin v. U. S., 31 F. (2d) 738, 739;
Leong Kim Wai v. Burnett, 23 F. (2d) 789;
Tom Ung Chai v. Burnett, 25 F. (2d) 574;
Lee Sai Ying v. U. S., 29 F. (2d) 108;
Dong Ling v. U. S., 30 F. (2d) 65.

VII.

The admission in evidence of the Manoa Chinese Cemetery record (the subject matter of Appellant's fourth Assignment of Error) was proper. This record is an ancient document. (R. pp. 124, 109-117.)

Barr v. Gratz's Heirs, 4 Wheat. (U.S.) 213, 217;
Johnson v. Jarvis, 223 F. 756, 758;
McGuire v. Blount, 199 U.S. 142;
Fulkerson v. Holmes, 117 U.S. 389;
Burns v. U. S., 160 F. 631;
William v. Conger, 125 U.S. 397.

Appellant cannot object to this record as being hearsay on appeal, not having objected on that ground in the trial Court.

Proffitt v. U. S., 264 F. 299;
Prudential Insurance Company of America v. Faulkner, 68 F. (2d) 676.

Even though Appellant's hearsay objection may be considered on this appeal, nevertheless, that objection is not applicable to this record since it comes within the "ancient document", "business entry" and "pedigree" exceptions to the hearsay rule.

Lewis v. Marshall, 5 Pet. (U.S.) 469, 475;
Hitchner Wall Paper Co. v. Penn. Ry. Co., 158 F. 1011, 1014;

- E. I. Dupont DeNemours & Co. v. Tomlinson*,
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3 *Jones Commentaries on Evidence* (2d Ed.),
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Stein v. Bowman, 13 Pet. (U.S.) 209, 219;
Gaines v. New Orleans, 6 Wall. (U.S.) 642,
699;
M'Claskey v. Barr, 54 F. 781, 784.

VIII.

Appellant cannot object to the admission in evidence of U. S. Exhibit No. 4, a disinterment permit, not having objected to its admission in evidence in the trial Court.

- Boland v. Great Northern Ry. Co.*, 202 F. 485;
Cornett v. U. S., 7 F. (2d) 531.

ARGUMENT.

THE PROCEEDINGS BEFORE THE BOARD IN 1923.

The claim made by the Appellant in support of his American citizenship consists of representations made by him on three occasions before executive officers, all of which are in the record, to-wit, on April 28, 1923, November 1, 1934, and on November 27, 1934, which representations were reiterated for the most part on trial before the District Court.

When Appellant appeared before the Board on April 28, 1923, as an applicant for admission, he gave

his age as 26 years. He stated that he was born in Honolulu, at Beretania near Nuuanu Street, in 1897, and departed with his father, Lau Ah Chew, from Honolulu for China on the S.S. "Doric" on November 24, 1899 (KS 25, 10th month, 22nd day) when two years of age, and that he thereafter resided in his father's home village of Lung Tow Wan, in China. His father, he stated, is living in China and is aged 65 years. He stated to the Board, without qualification as to the source of his knowledge, that *his mother was Tom Shee, who died in Honolulu on June 19, 1899 (KS 25, 5th month, 12th day), and that her remains were taken to China in 1917 (CR 6).* U. S. Exhibit No. 1, R. pp. 18-22.



**APPELLANT'S CLAIM OF HIS MOTHER'S DEATH IN HONOLULU
WAS THE ONLY CORROBORATION FOR HIS ASSERTED
HAWAIIAN BIRTH.**

The Government's case consisted of an attack upon the Appellant's claim that he was the son of this certain and definite Tom Shee who died in Honolulu on June 19, 1899.

The record of the Board's proceeding in 1923 gives as a basis for its decision admitting Appellant as a citizen that the files of the Territorial Board of Health in Honolulu record the death of one Tom Shee, age 38 years, on June 19, 1899, at Beretania and Smith Street, whose remains were disinterred on March 30, 1917. (R. p. 33.) The Board accepted in good faith the Appellant's then representations as to his maternity, and relied on this record as being the record

of Appellant's mother, basing its reliance on the Appellant's testimony. If the Appellant's mother died in Hawaii before he was two years old it would follow that the case for Appellant's native birth would be persuasively established.

WITHOUT THE ELEMENT OF CORROBORATION AFFORDED BY THE DEATH RECORD OF TOM SHEE, APPELLANT'S PROOF BEFORE THE BOARD IN 1923 WAS INADEQUATE.

The testimony of Appellant's original witnesses, two of whom claimed knowledge of an infant Lau Hu Yuen in Honolulu before 1899, indicates no subsequent contact with the Appellant whatsoever, although the applicant claimed he had seen them in China in 1922 and 1921, respectively. (R. p. 22.) This identification of an adult as an infant known 22 years before has necessarily been held by this Court to be of no probative value. (*Hung You Hong v. U. S.*, 68 F. (2d) 67 (1933).) Further, the identification by these witnesses of the Appellant on April 28, 1923, is proved to be valueless as each, on February 23, 1923, at Honolulu, had executed an affidavit to which was attached a recent photograph of the Appellant that had been sent from China for that purpose (R. pp. 28, 29) and Appellant presented this affidavit on arrival in Hawaii in 1923. The third witness in 1923, Wong Pan Hin, was four years younger than the Appellant, and had lived in China until 1920; his information concerning Appellant's birth was purely hearsay. (R. p. 31.)

The Board's finding in 1923 recites: "The Doric departed November 24, 1899, but there are no names

on the list". (R. p. 33.) Although the Appellant offered proof at trial that the departure manifest of the "Doric" for November 24, 1899, contains an entry for "Ah Chu" and "child" (R. p. 127), this entry was not considered by the Board in 1923, nor is there any showing by which this fragmentary and apparently incomplete entry may be identified with the Appellant at this time.

Since the ship's manifest in question is filed in the Public Archives of the Territory, it is open to public access. Therefore, this departure entry cannot of itself, without other corroboration, afford a basis for a conclusion that Appellant is the "child" named therein, or that the "Ah Chu" named is Appellant's father. Such was the decision of this Court in *Leong Kim Wai v. Burnett*, 23 F. (2d) 789 (1928).

THE CRUX OF APPELLANT'S CASE IS THE CLAIM OF HIS MOTHER'S DEATH IN HAWAII BEFORE HIS SECOND YEAR.

This review of the Board record in 1923 establishes, it is submitted, that the Appellant's claim of relationship as the son of Tom Shee, of whose death in the Territory in 1899 there is a Board of Health record, constituted the principal corroboration, and the only documentary evidence, of the Appellant's claim of Hawaiian birth. The Government, therefore, did not "build up a straw man to knock it down". (Brief, p. 9.)

THE TRIAL RECORD IN 1935.

APPELLANT'S TESTIMONY SINCE ADMISSION CONCERNING HIS ALLEGED MOTHER'S DEATH, BURIAL AND DISINTERMENT IS IN AGREEMENT WITH, AND SHOWS ADOPTION OF, THE BOARD OF HEALTH RECORD WHICH IS REVEALED TO HAVE BEEN MISTAKENLY RELIED ON BY THE BOARD.

The further developments in this case seem to leave no escape from the conclusion that the Appellant in 1923, and to date, has claimed to be the son of that certain and definite Tom Shee above referred to, and none other. When the Appellant testified in Court regarding his mother, he attributed all his information to his father (R. p. 128) who he then claimed had died in China in 1924 (*ibid*). However, in his testimony before immigration officers on November 1 and November 27, 1934, as an applicant for a travel document, which testimony he restated in Court, a progressive improvement in Appellant's recollection of additional details occurs—and *each of these details accords with the recitals of record in the files of the Board of Health*. Since the Appellant denied that he had ever referred to any records to refresh his recollection of what his father allegedly stated (R. p. 137), the source of this improvement is conjectural. Since the events occurred before his third year, it can hardly be attributed to the natural functioning of recollection.

Thus, on November 1, 1934, to the statements of fact regarding his alleged mother made in 1923, he added these details: *that death occurred at Beretania Street near Nuuanu, and her burial was at the Manoa Chinese Cemetery*. (R. p. 102.) On November 27, 1934 (R. p. 102), he added three more details: *that*

the cause of death was tuberculosis, and that the remains were disinterred on March 30, 1917, attended to by a local Chinese society, the Lung Doo Ching Sin Tong. Regarding the last date, the Appellant testified in Court on cross-examination that such was the date of arrival of his mother's remains in China (R. p. 134), and also alleged that disinterment might have been made by the Chung Sing Tong. (R. p. 132.) Otherwise, he restated the above details in his testimony in Court. (R. pp. 127-138.)

The record of the Bureau of Vital Statistics pertaining to the Tom Shee in question stated that she was disinterred in 1917. The Appellant fell into this trap and claimed that his mother was *disinterred and shipped to China* in 1917. (Tr. pp. 139, 102.) The public records did not show that the true son of Tom Shee, after having disinterred his mother in 1917, kept her remains in a small house in the cemetery and did not ship them to China until 1920, as George H. Leong, a son of that decedent, testified (post), and the Appellant had no way of obtaining this knowledge.

THE BOARD OF HEALTH DEATH RECORD OF THE TOM SHEE CLAIMED BY THE APPELLANT AS HIS MOTHER AND RELIED ON BY THE BOARD IN 1923 RELATED TO MRS. LEONG TOM SHEE, AND NOT THE APPELLANT'S MOTHER.

The records of the Territorial Board of Health, produced by the official custodian, Mary H. Lemon, show an entry regarding one Tam See, a Chinese female, aged 38 years, who died of consumption on June 19, 1899, at Honolulu, Beretania near Nuuanu Street,

buried at Manoa Cemetery (R. p. 88) for whose remains disinterment permit No. 572 was issued on March 30, 1917. (R. p. 90.) This record, of course, is open to the public, and in no way secret or confidential. However, it appeared that the disinterment permit had been issued to one George H. Leong, a son of the decedent, and not to the Appellant or the Chung Sing Tong Society.

TESTIMONY OF GEORGE H. LEONG.

George H. Leong testified (R. pp. 81-86) that he was born on September 11, 1890, in Honolulu, T. H., that Tom Shee, who was also known as Leong Tom Shee, was his mother, and Leong Din Moon was his father; that he was the eldest of a family of four which consisted of two boys and two girls, of whom the two sisters survive, one resident in Canton, China, and the other, Mrs. Jessie Leong Hou, a resident of Honolulu. He recalled that his mother died when he was nine years of age at the family home, then located near the Children's Playground at Beretania and Smith Street, bounded by Nuuanu Street. He stated that she died of a lingering sickness, with a crisis brought on by eating an orange. He recalled with particularity the incidents of her death and burial in Manoa Cemetery. He produced the original disinterment permit (U. S. Exhibit No. 4, R. pp. 40, 84), upon the stub of which, in the Board of Health Office, was written his name. (R. p. 90.) He also recalled the death of his infant brother, Leong Tai Hin, at the age

of about two years, at Kalihi Camp, where the family had taken refuge during the great fire of 1900. He associated the date of his mother's death as occurring some six months before that event. He did not know the Appellant, and denied that he was in any way related to him, or that his mother Tom Shee had any other children than those named by him. He stated that although he received the disinterment permit in 1917, the remains of his mother were not taken to China until 1920, being stored in a house in the cemetery in the interim. (R. p. 84.) He stated that his father had returned to China in 1922, and that his death occurred there in 1926.

TESTIMONY OF JESSIE LEONG HOU.

Mrs. Jessie Leong Hou, the sister of George H. Leong, testified to the same parentage and the same family members. (R. pp. 91-93.) She was born in 1895, and had no independent recollection of the death of her mother in 1899, but corroborated the previous testimony of her brother as a matter of family knowledge. She also was positive in disavowing the Appellant as a member of her family, and in denying the possibility of any other children of her mother, Tom Shee, than herself and sister in Canton and her brother George and the deceased brother, Tai Hin. She also testified that the Chinese characters for "Tom Shee" may be read as "Tam See". This seems not to be disputed.

APPELLEE'S WITNESSES WERE CORROBORATED BY THE RECORDS OF THE MANOA CHINESE CEMETERY.

It will be noted that thus far the documentary proof of the identity of the decedent Tom Shee shown in the Board of Health records is incomplete with reference to the name of her husband, and the place of her birth or home village in China. This omission was supplied by the testimony of George H. Leong and Jessie Leong Hou (*supra*) and by a stub of the original burial permit issued by the Manoa Chinese Cemetery at the time of interment, *found in the first of a series of such stub books* running from 1893 to 1928. (R. pp. 110, 111.) The entire intact series of stub books covering that period was before the Court. The entries on the stub admitted in evidence related to the burial in grave No. 58, of one Tom Shee, wife of Din Moon, who died on June 19, 1899, whose native village was Lung Yit Tow. (U. S. Exhibit No. 5, R. pp. 126, 41.)

THE APPELLANT CORRECTLY STATED ONLY THOSE DETAILS WITH REFERENCE TO TOM SHEE WHICH WERE A MATTER OF PUBLIC RECORD.

From the foregoing it appears that the Appellant in 1923, and with progressive improvement regarding details, in 1934, stated correctly the details regarding his alleged mother, Tom Shee, which were of public record in the office of the Board of Health. But as to other facts not there of record regarding that decedent, he is in error. Tom Shee's husband was not Lau Ah Chew or Chu, the Appellant's alleged father,

but was Leong Din Moon. She did not have but one child, the Appellant, as he testified, but had four children, two of whom were Government witnesses. She was not from Appellant's parents' village of Lung Tow Wan, but from Lung Yit Tow. Her remains had been disinterred, not by a local Chinese society as Appellant claims, but by her eldest son, George H. Leong, and the transfer of the remains was made, not in 1917, as the record of the Board of Health indicated, but in 1920.

THE APPELLANT AT TRIAL DID NOT CLAIM ANY TOM SHEE AS HIS MOTHER OTHER THAN THE DECEDENT WHO WAS THE SUBJECT OF THE BOARD OF HEALTH RECORD. HE CANNOT NOW PRESENT A DEFENSE OTHER THAN THERE ADVANCED.

Assuming the honesty of this Appellant in stating that his father gave him the information detailed by the Appellant, only one explanation is possible, namely, that there occurred the death of another Tom Shee, who was this Appellant's mother, on the same date, at the same locality, of the same ailment, buried in the same cemetery, and disinterred on the same date eighteen years later, *but of whom there is no record, and concerning whose existence and death no living person can be called to testify.* This contention seems to be hinted at as the theory of Appellant's case on appeal. *It still overlooks the fact that even this assumption fails to relieve the original Board action of the error and the improvidence of having based its decision on an inapplicable record.*

That is, stating this assumption in another way, the certificate of identity issued the Appellant on May 29, 1923, was issued to him based on the evidence of (1) his claim of Hawaiian birth as the son of Tom Shee (Tom See) born in Honolulu at Beretania near Nuuanu Street as supported by the (2) records of the Board of Health which support Appellant's contention as to the name of the alleged mother, the place and date of her death, her place of burial and the date of her disinterment. It is beside the question here, whether the Appellant made the representations to the Board of Special Inquiry honestly believing them to be true or whether he did so knowing that his claim was absolutely fraudulent. The important and vital issue is—Did the Board of Special Inquiry issue this certificate upon facts that they then believed to be true but which now turn out to be false in fact? The certificate so issued by the Board of Special Inquiry through such error and improvidence is a fraud upon the Government and its efficacy has been nullified. The Appellant making no other claim of American birth or parentage, there is no basis, in law or in fact, to predicate a right for him to be or remain in the United States.

It developed from the evidence that the Board of Health records for several years prior and subsequent to 1899 were complete (R. p. 91) and showed the death of only one other "Tam See" or "Tom Shee" and that was a "Tam Shee" who died in June, 1898, at a different time, at a different locality, of a different ailment, and was buried in a different cemetery, and disinterred at a different time than Appellant claimed

regarding his mother. (R. p. 90.) The Appellant did not attempt to prove the existence of any other record of the death of a Tom Shee, nor did he, with the Manoa Chinese Cemetery records available, attempt to show a record of burial there of his true mother, or of any other Tom Shee.

THE ERRORS ASSIGNED BY APPELLANT.

The Second, Seventh, Eighth and Ninth Assignments of Error (Brief, pp. 6, 7) (the First, Sixth and Tenth are not argued in the Brief), in effect present a single question, namely: Did the evidence of Appellee overcome the presumption arising from Appellant's prior admission and the issuance to him of a certificate of identity which created for him a prima facie case of his right to be in the United States?

It is submitted that the foregoing facts clearly establish that Appellant obtained admission into the United States in 1923 by fraudulent representations of citizenship. (*Young Mew Song v. U. S.* (1929), 36 F. (2d) 563.)

It is well settled that the unqualified affirmation of a fact not known to be true may constitute fraud.

Lynch v. Mercantile Trust Co., 18 F. 486;

W. P. Walker & Co. v. Walbridge, 136 F. 19,
23, 26 C. J. 1109, Sec. 39.

Furthermore, a fraudulent intent may be presumed from the above circumstances. In *Ex parte Wong Yee Toon*, 227 Fed. 247, 252, the Court said:

“The petitioner says, however, that the charge in this case is that he secured his admission by fraud and that upon that issue the government must sustain the burden of proof. Be it so. Nevertheless if petitioner is not the son of the Oakland merchant the charge is true.”

FRAUD IS NOT THE SOLE GROUND OF IMPEACHMENT OF THE
PRIOR FAVORABLE ADMINISTRATIVE DECISION.

Appellant's contention is that the prima facie case for him can be overcome only by proof of fraud that is “clear, cogent, and convincing”. The authorities cited for this language (Brief p. 16) are not deportation cases. It is submitted that this view is unsupported as applied to the case at bar.

The Supreme Court has stated with reference to the effect of a certificate of identity in a deportation proceeding (*Lui Hop Fong v. U. S.* (1908), 209 U.S. 453), that there should be first “some competent evidence to overcome the legal effect of the certificate”. That view was followed by this Court in 1917 in *Lui Hip Chin v. Plummer*, 238 F. 763. This Court indicated that the evidence should show that “the certificate had been fraudulently or *irregularly* procured” (*Lum Man Sing v. U. S.* (1928), 29 F. (2d) 500, 501), and concluded (502) that “a record containing any substantial evidence tending to impeach its correctness, or to show that the holder's status is other than what is certified, would be sufficient to warrant deportation”. It will be observed that the disjunctive

is used. In *Leong Kwai Yin v. U. S.*, 31 F. (2d) 738, 739, this Court said:

“In *Lum Man Sing v. U. S.*, 29 F. (2d) 500, this Court held that a certificate of identity issued to a Chinese person * * * is prima facie evidence of the right of the holder of the certificate to be and remain in the United States until overcome by proof tending to show that the certificate was issued improvidently, or was fraudulently obtained. * * * The decision of the Board of Special Inquiry admitting the appellant and his certificate of identity are in no wise impeached for either fraud or error.”

And again it should be noted there the disjunctive is used.

The statute provides (supra) that persons of the Chinese race, when defendants in deportation proceedings, shall have the burden of affirmatively establishing their right to be in the United States (supra). This statutory requirement, it is submitted, would be nullified by requiring that the Government, in order to meet its initial burden of attack when a certificate of identity has been issued, or where there has been a prior admission as a citizen, must prove fraud. That the Government need not prove fraud is further supported by the cases of *Leong Kim Wai v. Burnett* (1918), 23 F. (2d) 789; *Tom Ung Chai v. Burnett* (1928), 25 F. (2d) 574; and *Lee Sai Ying v. U. S.* (1928), 29 F. (2d) 108. In *Dong Ling v. U. S.* (1929), 30 F. (2d) 65, the proof established that a departure record for “Ah Kona and boy” had been mistakenly

applied to the defendant by the admitting Board. This was held to justify deportation.

The foregoing cases in which deportation was ordered by this Court, and the instant case, are to be distinguished from the decisions cited by appellant in which deportation orders were reversed because *no* evidence was presented by the Appellee to impeach the original Board action, as in *Lum Man Shing v. U. S.* (1928), 29 F. (2d) 500, and *Choy Yuen Chan v. U. S.* (1929), 30 F. (2d) 516.

Also, the instant case is not within the rule enforced in *Fong Lum Kwai v. U. S.* (1931), 49 F. (2d) 19, and in *Lee Choy v. U. S.* (1931), 49 F. (2d) 24, which cases held that the mere proof that numerous other claimants claimed the same departure or death record, without evidence as to the true identity of the person so named in such record, is insufficient to overcome the *prima facie* case arising from the prior admission of the defendant as a citizen. In the case at bar the Government has put forward affirmative evidence of the actual identity of the person named in the vital statistics record upon which the Board relied, and which the appellant claimed.

THE GOVERNMENT IS NOT REQUIRED TO CALL THE APPELLANT OR APPELLANT'S WITNESSES AS ITS WITNESSES FOR THE PURPOSE OF IMPEACHING THEM OR DEVELOPING DISCREPANCIES.

It is urged by Appellant that the Appellee must not only prove fraud, but must also prove that Appel-

lant's witnesses were perjurers. This, it is submitted, is not the law. The authorities discussed, supra, hold that if the original administrative action is impeached for either fraud or error, that is sufficient to put the defendant to his statutory burden of proof. The *initial burden of attack* on the certificate which the Government must meet cannot be converted into a *burden of proof* on the Government in disregard of statute.

The Appellant, it is submitted, errs in contending that the Government was required to call Appellee's original witnesses in the Board proceeding to testify at the trial. Any evidence so adduced would have been incompetent to overcome the prima facie case for Appellant. It was held in *Fong Lum Kwai v. U. S.*, 49 F. (2d) 19, 23, that "the mere development of discrepancies on the part of the witnesses summoned by the Government is insufficient to overcome the prima facie presumption which arises from the finding of the Board of Special Inquiry".

It is submitted further than the trial Court was correct in holding that since it had been established that two of the original 1923 witnesses were now available (R. pp. 136, 78), an inference must be drawn against the Appellant for his failure to summon them at the trial. (Decision, R. pp. 52, 53.)

Hung You Hong v. U. S., 68 F. (2d) 67, 69 (C.C.A. 9) (1933). This is conduct which forms a basis for inference and in a deportation case is evidence. *Bilokumsky v. Tod*, 263 U.S. 149, 153.

THE THIRD ASSIGNMENT OF ERROR RELATIVE TO ADMIS-
SION OF THE DISINTERNMENT PERMIT. (U. S. EXHIBIT
NO. 4.)

No argument on this alleged error appears in Appellant's brief. Reference to the record discloses that Appellant failed to object or except to the ruling of the Court admitting Appellee's Exhibit No. 4 in evidence. Therefore, the question of the admissibility of this exhibit cannot now be considered on appeal. The authorities hold that if evidence is received without objection, alleged error based on its reception will not be reviewed by the Appellate Court.

Boland v. Great Northern Ry. Co., 202 F. 485

(C.C.A. 9);

Cornett v. U. S., 7 F. (2d) 531.

THE FOURTH ASSIGNMENT OF ERROR RELATIVE TO ADMIS-
SION OF THE MANOA CHINESE CEMETERY RECORD.

This stub book was admitted in evidence as U. S. Exhibit No. 5. To quote the Court's reason for overruling the Appellant's objection to the admissibility of this record into evidence (R. p. 124):

“On the face of the instrument it shows that it is 35 years old. It was brought in from the hands of the custodian; it has been shown to have been in the hands of the Treasurer for some time, until the copies were made, rendering the necessity for the keeping that record by that particular official no longer necessary; the copies were not admitted in evidence; the book itself has the appearance of age; the books with which it was con-

nected had the appearance of age, though not as great as the one in question; from the Court's examination of this particular book it was shown that there are purported interments in the Manoa Chinese Cemetery running from 1894 to 1904, if I remember rightly, or 1906."

It appeared further than the parties who made the record were deceased and that the record was a business record. (R. pp. 109-117.)

This cemetery burial record was established as relating to the same Tom Shee covered by the Board of Health record, both by the recitals contained in the burial record and by the testimony of George H. Leong. It was admissible, therefore, to prove the family name of such Tom Shee, and to further identify the person named in the Board of Health record.

That a document of this nature is admissible in evidence as an ancient document without further proof of its authenticity is clear under the authorities.

Barr v. Gratz's Heirs, 4 Wheat. (U.S.) 213, 217;

Johnson v. Jarvis, 223 F. 756, 758;

McGuire v. Blount, 199 U.S. 142;

Fulkerson v. Holmes, 117 U.S. 389;

Burns v. U. S., 160 F. 631;

William v. Conger, 125 U.S. 397.

Appellant argues (Appellant's Brief p. 11) that the recitals contained in U. S. Exhibit No. 5 are hearsay, and that on that ground this Exhibit was erroneously admitted in evidence. The record discloses that when

U. S. Exhibit No. 5 was offered in evidence, counsel for Appellant objected to the offer on a number of grounds (R. p. 124), but failed to object on the ground that it is hearsay. It is well settled that when evidence is inadmissible but its introduction is objected to on grounds that do not apply and the objection is overruled, the Appellate Court will not consider such an alleged error. *Proffitt v. U. S.*, 264 F. 299 (C.C.A. 9); *Prudential Insurance Company of America v. Faulkner*, 68 F. (2d) 676.

Assuming that Appellant's hearsay objection to the Manoa Cemetery Record may be considered on this appeal, it is submitted, nevertheless, that this objection is not supportable under the authorities cited, *supra*. That this cemetery record is further admissible as a business record of original entry is also clear under the authorities.

In *Lewis v. Marshall*, 5 Pet. (U.S.) 469, 475, an extract from a registered book of burials in Christ's Church was held properly admitted in evidence.

See, also:

Hitchner Wall Paper Co. v. Penn. Ry. Co., 158 Fed. 1011, 1014;

E. I. Dupont DeNemours & Co. v. Tomlinson, 296 Fed. 635;

Central Commercial Co. v. Jones Dusenbergh Co., 215 Fed. 213.

The record discloses that the information contained in the recital in the Manoa Cemetery record (U. S.

Exhibit No. 5) was furnished by relations of the decedent. (R. p. 110.)

It is submitted, therefore, that these recitals being matters of pedigree are admissible under the pedigree exception to the hearsay rule, as well as under the exceptions previously discussed.

Fulkerson v. Holmes, 117 U.S. 389, at 397, 398;
3 *Jones Commentaries on Evidence* (2d. Ed.),
2108, Sec. 1147;

Stein v. Bowman, 13 Pet. (U.S.) 209, 219;

Gaines v. New Orleans, 6 Wall. (U.S.) 642, 699.

On principle there is little to distinguish an entry in a cemetery record from an entry in a family Bible or inscription on a monument. The authorities hold that entries in a family Bible are admissible in evidence under the pedigree exception to the hearsay rule. *Lewis v. Marshall*, supra, and the same is held as to inscriptions on monuments.

M'Claskey v. Barr, 54 Fed. 781, 784.

It is submitted that it does not avail appellant to argue the incompleteness of these death and departure records. (Brief p. 17.) A single death record is here at issue which record was entered in the Board of Health Records. Furthermore, there is no evidence in this record on appeal regarding the alleged deficiencies of local death records. The opposite is true. On cross-examination, the Registrar General of the Board of Health "was asked if she knew whether or not the record of deaths occurring in Honolulu in the years 1898-1899-1900 were complete and she said yes." (R. p. 91.)

The controversial statement from an 1899 report of the President of the Board of Health (Brief p. 17), is not material, nor has it been admitted in evidence in this case. The same is true of the 1902 Board of Health report (Brief p. 19) relating to disinterments.

CONCLUSION.

It is submitted as to the law:

(1) That issuance of a Certificate of Identity or admission into the United States as a citizen does not give rise to a prima facie case which can be overcome only by proof of conscious, active, and actionable fraud by the Chinese. It merely imposes upon the Government an initial burden of attack which is met by showing fraud, legal, imputed, or constructive—*error*, or improvidence, in that admission, or issuance of the Certificate.

(2) That when the original admission is so impeached, it next devolves upon the Appellant to meet the burden imposed by the Chinese Exclusion Acts, Section 3, Act of May 3, 1892, 8 U.S.C.A. 284. “A prima facie case must be made by the Government in the first instance, but the burden of proof to show a right to remain is upon the defendant”. Judge Neterer in *U. S. v. Chin Nun Gee* (1930), 45 F. (2d) 225, 226.

It is submitted, secondly, upon the facts:

(1) That the evidence established a false claim of maternity by this Appellant at the time of his admis-

sion; that it is shown that Appellant, by his evidence, misled the admitting Board, causing it to rely on an official record that did not pertain to this Appellant's mother; that this error and fraud related to a vital and material point in Appellant's original proof of his claim of citizenship.

(2) That, therefore, the prima facie case for Appellant arising from his prior admission as a citizen was overcome.

(3) That Appellant failed to sustain the statutory burden of proving his claim of Hawaiian birth; that he offered no affirmative proof for the assistance of the Court other than to repeat his ill-founded erroneous claim of maternity.

This Court has recently emphasized the requirement of the law which this Appellant has failed to meet. (*Hung You Hong v. U. S.* (1933), 68 F. (2d) 67.)

The decision appealed from should be affirmed.

Dated, Honolulu, T. H., this 30th day of April, 1936.

Respectfully submitted,

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